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# DANGER DRINK

A large, bold, black word 'DRINK' is partially obscured by a can of energy drink. The can is silver and covered in condensation, with a splash of water and foam erupting from the top, splashing over the letters 'R' and 'I' of 'DRINK'. Above the can, the word 'DANGER' is written in large, bold, red letters.

By || KEVIN I. GOLDBERG

Energy drinks are injuring and killing teenagers and young adults, leading to lawsuits against the products' manufacturers. Learning how to litigate these cases is essential to holding the companies accountable.

**R**emember Joe Camel? Energy drink companies target their marketing to teenagers and young adults just as cigarette companies did in the 1980s and 1990s, and growing evidence suggests that these drinks are dangerous.

Energy drinks are flavored beverages that contain high amounts of caffeine and other stimulants, such as taurine, guarana, and panax ginseng. The drinks stimulate the central nervous system and the cardiovascular system, and they can cause caffeine toxicity, heart attacks, arrhythmias, strokes, and other injuries.

The two most popular energy drinks in the United States are Monster Energy Drink and Red Bull. Retail sales of

# POUS IKS

energy drinks amounted to approximately \$8.9 billion in 2011, up from approximately \$7.7 billion in 2010.<sup>1</sup>

As a result of aggressive marketing campaigns, these drinks are popular among teenagers and young adults and can be purchased—even by children—at almost any grocery or convenience store. The companies sponsor extreme athletes, promote concerts, and glorify the “buzz” and stimulant effect the drinks deliver.<sup>2</sup> Like certain herbal supplements that have caused injuries, such as ephedra and Hydroxycut, energy drinks are not regulated by the FDA.

The manufacturers claim that the drinks are “dietary supplements” governed by the Dietary Supplement Health and Education Act of 1994.<sup>3</sup> Under this law, energy drink makers do not have

to disclose all the ingredients in their products, and generally manufacturers do not need to register their products with the FDA or get FDA approval before producing or selling dietary supplements.<sup>4</sup> For example, the ingredient list on Monster Energy Drink cans does not disclose the specific amounts of caffeine, guarana, L-carnitine, inositol, glucuronolactone, or maltodextrin. The list only indicates that the 24-ounce can contains 2,500 mg of an “energy blend.” Red Bull lists the amount of caffeine but not the amount of taurine it contains.<sup>5</sup>

Although the energy drink industry is relatively young, there are already several peer-reviewed scientific articles discussing the dangers of energy drinks and arguing that all children, as well as adults with known cardiovascular disease, should avoid the drinks. Researchers who have studied energy drinks have concluded that

- consuming them causes an increase in blood pressure and heart rate

among healthy young adults, the main marketing target.<sup>6</sup>

- energy drinks could have a greater impact on blood pressure and heart rate in individuals with known cardiovascular disease.<sup>7</sup>
- young adults and children with undiagnosed heart disease could be at particular risk.<sup>8</sup>
- there could be dangerous interactions between energy drinks and drugs used to manage blood pressure and heart rate.<sup>9</sup>
- people with known cardiovascular disease should avoid energy drinks.<sup>10</sup>
- energy drinks have no therapeutic benefit and may put some children at risk for serious adverse health effects.<sup>11</sup>
- youth-aimed marketing and adolescents’ risk-taking tendencies combine to increase overdose potential.<sup>12</sup>
- children and adolescents who are not habitual caffeine users are particularly vulnerable to caffeine intoxication due to a lack of pharmacological tolerance.<sup>13</sup>
- in pregnant women, high caffeine intake is associated with risk for late miscarriages, stillbirths, and small-for-gestational-age infants.<sup>14</sup>

Despite growing evidence that energy drinks can be dangerous to anyone with an underlying heart condition, the energy drink industry has not taken steps to provide adequate warnings

and product information to potential purchasers.

Energy drink warning labels lack the specificity that would allow consumers to make an informed choice whether to purchase the product; they are placed inconspicuously on the cans in small print. For example, the warning on a 24-ounce can of Monster reads: "Consume responsibly: Limit 2 cans per day. Not recommended for children, pregnant women, or people sensitive to caffeine." By contrast, the FDA requires manufacturers of over-the-counter stimulant drugs such as NoDoz to include a much stronger warning and to disclose to consumers the amount of caffeine in the product—and such drugs contain significantly less caffeine than some energy drinks.<sup>15</sup>

The scientific and medical community is urging the FDA to regulate the

industry.<sup>16</sup> Trial lawyers also have been working with federal legislators to get the FDA to regulate energy drinks, and they have been at the forefront of bringing these drinks' hidden dangers to the public's attention. New York's attorney general and San Francisco's city attorney are also investigating the safety of energy drinks.<sup>17</sup>

### Energy Drink Lawsuits

As public awareness of these drinks' dangers increases, lawyers have begun taking cases involving injuries caused by energy drink consumption. Personal injury lawsuits have been filed against energy drink manufacturers. In these products liability cases, the plaintiffs allege that energy drinks led to deaths and serious injuries, and the typical causes of action are negligence, failure

**Energy drink warning labels lack the specificity that would allow consumers to make an informed choice whether to purchase the product.**

to warn, breach of warranty, and strict liability. You also should consider violations of consumer protection acts and even intentional torts, such as fraud.

Plaintiff attorneys have the burden of proving a particular energy drink caused the injury and the energy drink was defective. In evaluating whether to pursue a case, the two most important things to consider at the outset are product identification and whether specific

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causation can be established. Like other products liability cases, energy drink lawsuits require numerous experts and can be expensive to pursue, so careful case selection is crucial.

**Product identification.** It is important to ensure that the product can be correctly identified. At intake, tell the potential client to save the energy drink can if possible, as well as the receipt or any other proof of purchase. You also should obtain the names and contact information of anyone who witnessed the person consuming the energy drink. Sometimes the patient history portion of the medical records will contain the fact that the individual consumed a particular energy drink.

**Specific causation.** The strongest liability cases are those involving teenagers and young adults who consumed

energy drinks with no presence of alcohol or drugs and who suffered a cardiac event or stroke within several hours of consumption. Many energy drink manufacturers direct their marketing efforts toward this vulnerable population, and the peer-reviewed scientific literature supports the notion that energy drink consumption causes an increase in blood pressure and heart rate.<sup>18</sup> Ideally, the blood work performed at the hospital will screen for caffeine levels, and any autopsy or death certificate will indicate caffeine toxicity as a cause of death.

When interviewing potential clients, you should keep in mind that younger people with undiagnosed medical conditions may be particularly vulnerable to serious injuries after consumption. Such undiagnosed conditions include congenital heart defects, mitral valve

#### MORE ON ENERGY DRINKS

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prolapse, Ehlers-Danlos Syndrome, and high blood pressure. Mitral valve prolapse occurs when the valve between the heart's left atrium and left ventricle does not close properly, and blood can leak backward into the left atrium.<sup>19</sup> Ehlers-Danlos Syndrome is a connective tissue




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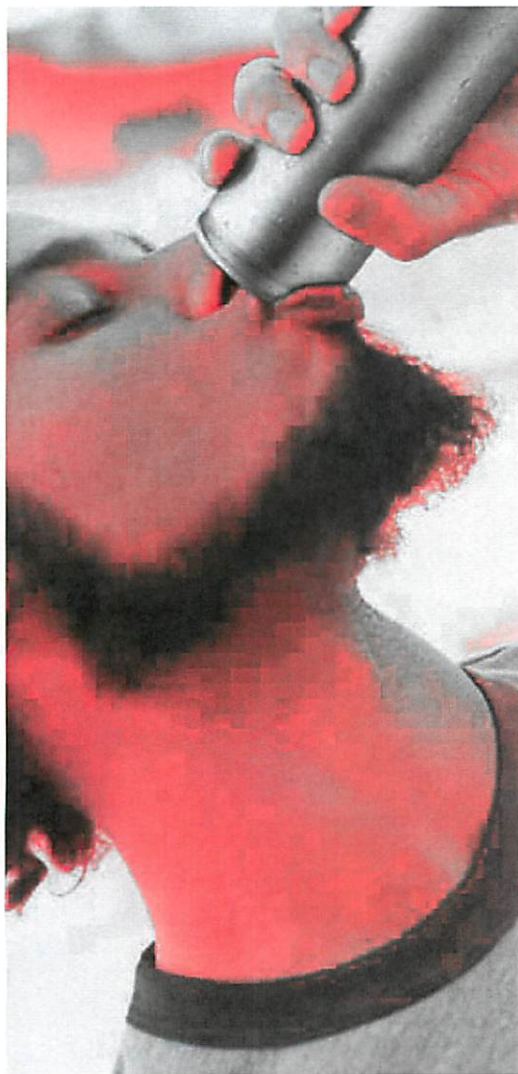


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**The strongest liability cases are those involving teenagers and young adults who consumed energy drinks with no presence of alcohol or drugs and who suffered a cardiac event or stroke within several hours of consumption.**



disorder whereby the tissue in the skin, joints, and blood vessel walls becomes weak and elastic.<sup>20</sup>

Certain red flags should make you think twice before taking a case. If the person consumed more than one brand of energy drink and simultaneously consumed other herbal supplements or certain prescription medications, proving specific causation will be difficult. Avoid cases involving smokers and individuals with other medical conditions that predispose them to heart disease. Cases involving older people are more difficult because as people age, they typically develop additional risk factors for heart attack and stroke. Still, screen and evaluate these cases on a case-by-case basis because most energy drink manufacturers do not properly warn the public that people with known heart conditions and other risk factors should not consume energy drinks.

At the initial client interview, identify all the risk factors that could have contributed to the injury. For example, in a heart attack case, examine other potential risk factors: Was the person a smoker or a diabetic? Did he or she have high blood pressure or a preexisting cardiac condition? Is he or she overweight? Did the individual consume drugs or alcohol along with the energy drink? What prescription medications, vitamins, or herbal supplements did the person have in his or her system at the time of the heart attack or stroke? You need to know this information from the outset because the defense will confuse the issues presented to the jury to avoid liability.

Obtain several years of prior medical records from the plaintiff's primary care doctor to evaluate causation. The other requisite materials for proper case evaluation include proof of energy drink consumption (the can, receipt, or proof of purchase), other medical records, police and incident reports, 911 call tapes, and text messages and emails sent around the

time of the incident. In wrongful death cases, the death certificate and a copy of the autopsy report should be acquired. It is also important to find out every substance the person consumed in the 48 hours before the injury: foods, beverages, over-the-counter medications, prescription medications, herbal supplements, vitamins, drugs, and alcohol.








**Potential defendants.** The primary defendant is the company that manufactured and marketed the product. You should also consider suing the retail establishment where the drinks were purchased and the product distributor. When the facts support a claim against a local retailer or distributor, naming that party as a defendant may avoid removal of the case to federal court by defeating diversity of citizenship.

**Where to file.** While each state is different, an energy drink lawsuit typically can be filed in either the venue where the injury occurred or where the defendant energy drink company resides. Careful consideration must be given to where the lawsuit is filed and to choice-of-law issues regarding liability, damages, and the admissibility of expert witness testimony. Every state has different laws regarding civil procedure, products liability, and damages (including some states' caps on damages). For instance, does the state you wish to file in recognize strict liability as a cause of action? How does that venue apply *Daubert* to expert witnesses?

For example, assume someone dies of cardiac arrest after consuming a Monster Energy Drink in Maryland. The lawsuit can be properly filed in Maryland or California because Monster's principal place of business is in Corona, Calif. If suit is filed in Maryland, that state's substantive law will apply, there will be a cap on damages, pure contributory negligence will apply to the negligence count, and it will be nearly impossible to obtain punitive damages.

If suit is filed in California, California

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substantive law may apply because that state uses a government interest analysis, which balances the competing states' interests in having their own rule of law applied to the case.<sup>21</sup> California courts have held, "The interest of a state in a tort rule limiting damages for wrongful death is to protect defendants from excessive financial burdens or exaggerated claims. . . . [T]his interest . . . is also primarily local."<sup>22</sup> Assuming California law applies, the plaintiff has a much better chance of a fair recovery that properly compensates for all aspects of the loss because the threshold for punitive damages is lower in California than it is in Maryland.<sup>23</sup>

Energy drinks can be deadly, and the industry has failed to properly warn consumers of the known dangers. Through litigation, public awareness campaigns, and legislative efforts, trial lawyers are helping to draw attention to the dangers of energy drinks and to compensate people injured by them. 

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**NOTES**

1. See Reed Albergotti & Mike Esterl, *New York Probes Energy-Drink Makers*, Wall St. J. (Aug. 28, 2012), <http://online.wsj.com/article/SB10000872396390444230504577615690249123150.html>; see also David J. Phillips, *Monster Beverage Stock: There Are Problems Beyond the Recent Health Scare*, [http://ycharts.com/analysis/story/monster-beverage\\_stock\\_there\\_are\\_problems\\_beyond\\_the\\_recent\\_health\\_scare](http://ycharts.com/analysis/story/monster-beverage_stock_there_are_problems_beyond_the_recent_health_scare) (Oct. 29, 2012).
2. Monster Energy promotes its drink by stating: "Tear into a can of the meanest energy supplement on the planet, Monster Energy. It's the ideal combo of the right ingredients in the right proportion to deliver the big bad buzz that only Monster can. Monster packs a powerful punch but has a smooth easy drinking flavor. Athletes, musicians, anarchists, co-eds, road warriors, metal heads, geeks, hipsters, and bikers dig it—you will too." [www.monsterenergy.com/en/products/monster-energy](http://www.monsterenergy.com/en/products/monster-energy). The Red Bull website states: "In short, Red Bull gives wings to people who want to be mentally and physically active and have a zest for life." [www.redbull.com/cs/Satellite/en\\_INT/Red-Bull-Energy-Drink/001242937921959](http://www.redbull.com/cs/Satellite/en_INT/Red-Bull-Energy-Drink/001242937921959).

3. Dietary Supp. Health & Educ. Act of 1994, Pub. L. No. 103-417 (1994).
4. U.S. Food & Drug Administration, *Dietary Supplements*, [www.fda.gov/food/dietary-supplements/default.htm](http://www.fda.gov/food/dietary-supplements/default.htm) (Nov. 16, 2012). The FDA website explains: "FDA regulates both finished dietary supplement products and dietary ingredients under a different set of regulations than those covering 'conventional' foods and drug products (prescription and over-the-counter). Under the Dietary Supplement Health and Education Act of 1994 (DSHEA), the dietary supplement or dietary ingredient manufacturer is responsible for ensuring that a dietary supplement or ingredient is safe before it is marketed. . . . Manufacturers must make sure that product label information is truthful and not misleading."
5. Taurine is a nonessential amino acid found in the brain that acts as a neuromodulator and neurotransmitter. Although it has not been widely studied, one study suggests that energy drinks containing caffeine and taurine together can cause an elevation in blood pressure and a decrease in heart rate. Allison Bichler et al., *A Combination of Caffeine and Taurine Has No Effect on Short Term Memory But Induces Changes in Heart Rate and Mean Arterial Blood Pressure*, 31 *Amino Acids* 471 (2006). Another study suggests that ingesting taurine and caffeine together increases cardiac contractility. M. Baum & M. Weiss, *The Influence of a Taurine Containing Drink on Cardiac Parameters Before and After Exercise Measured by Echocardiography*, 20 *Amino Acids* 75 (2001).
6. See e.g. Leah Steinke et al., *Effect of "Energy Drink" Consumption on Hemodynamic and Electrocardiographic Parameters in Healthy Young Adults*, 43 *Annals Pharmacotherapy* 596, 599 (Apr. 2009), <http://chua2.fiu.edu/faculty/kalmand/HUN6248/ppp/Annals%20Pharmacotherapy%20Energy%20Drink%20and%20BP%20HR%20response%20Kalus%202009.pdf>.
7. *Id.* at 601.
8. *Id.*
9. *Id.*
10. *Id.*
11. Sara M. Seifert et al., *Health Effects of Energy Drinks on Children, Adolescents, and Young Adults*, 127 *J. Am. Acad. Pediatrics* 511, 522 (Feb. 14, 2011), <http://pediatrics.aappublications.org/content/early/2011/02/14/peds.2009-3592>.
12. *Id.*
13. Chad J. Reissig et al., *Caffeinated Energy Drinks—A Growing Problem*, 99 *Drug & Alcohol Dependence* 1, 6 (Jan. 1, 2009), [www.hopkinsmedicine.org/Press\\_releases/2008/Griffiths.pdf](http://www.hopkinsmedicine.org/Press_releases/2008/Griffiths.pdf).
14. Amelia M. Arria & Mary Claire O'Brien, *The "High" Risk of Energy Drinks*, 305 *JAMA* 600 (Jan. 25, 2011), [www.ncbi.nlm.nih.gov/pmc/articles/PMC3038341](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3038341).
15. Reissig, *supra* n. 13, at 3.
16. See e.g. Arria & O'Brien, *supra* n. 14. "To promote informed consumer choices, regulatory agencies should require specific labeling regarding caffeine content, with warnings about the risks associated with caffeine consumption in adolescents and in pregnant women as well as with explicit information about the potential risks associated with mixing energy drinks with alcohol. Scientists and health professionals cannot wait for further FDA action—available scientific evidence indicates that action is needed now. The collective priority of health professionals should be to educate the public about known risks, and industry officials and servers should caution consumers about the risks of mixing alcohol with energy drinks."
17. See Barry Meier, *San Francisco Questions Maker of Energy Drinks About Their Safety*, N.Y. Times, (Nov. 1, 2012), [www.nytimes.com/2012/11/02/business/safety-of-monster-energy-drinks-questioned.html](http://www.nytimes.com/2012/11/02/business/safety-of-monster-energy-drinks-questioned.html); Nelson D. Schwartz, *New York State Is Investigating Energy Drink Makers*, N.Y. Times, (Aug. 28, 2012), [www.nytimes.com/2012/08/29/business/new-york-state-is-investigating-energy-drinks.html](http://www.nytimes.com/2012/08/29/business/new-york-state-is-investigating-energy-drinks.html).
18. See e.g. Steinke et al., *supra* n. 6.
19. See Mayo Clinic, *Mitral Valve Prolapse*, [www.mayoclinic.com/health/mitral-valve-prolapse/DS00504](http://www.mayoclinic.com/health/mitral-valve-prolapse/DS00504) (Apr. 21, 2011).
20. See Mayo Clinic, *Ehlers-Danlos Syndrome*, [www.mayoclinic.com/health/ehlers-danlos-syndrome/DS00706](http://www.mayoclinic.com/health/ehlers-danlos-syndrome/DS00706) (Sept. 20, 2012).
21. *Tucci v. Club Mediterranee, S.A.*, 107 Cal. Rptr. 2d 401, 407 (Cal. App. 2001) (explaining that California resolves choice-of-law questions in disputes arising out of a tort using the "governmental interest analysis," which balances the interests of the involved states and parties).
22. See e.g. *Hurtado v. Super. Ct.*, 522 P.2d 666, 670 (Cal. 1974).
23. To obtain punitive damages in a Maryland products liability case, the defendant must have actual knowledge of the product's defect and have consciously and deliberately disregarded a foreseeable harm that might result from the defect. See *Owens-Ill., Inc. v. Zenobia*, 601 A.2d 633 (Md. 1991).